THE NEW YORK TAX CASES

Supreme Court of the United States

OCTOBER TERM, 1923.

BASS, RATCLIFF & GRETTON, LIMITED, Plaintiff-in-Error, against STATE TAX COMMISSION, Defendant-in-Error.	No. 24.
GORHAM MANUFACTURING COMPANY, Appellant, against STATE TAX COMMISSION OF NEW YORK and CARL SHERMAN, individually and as Attorney General of the State of New York, Appellees.	No. 14.

REPLY BRIEF FOR PLAINTIFF-IN-ERROR AND APPELLANT.

Separate briefs have been filed by the State Tax Commission in these cases.

THE GORHAM CASE.

I.

The appellees' argument in the Gorham case is as follows:

Point I is that the plan of taxation is an equitable one and constitutional on its face.

This is so if it is equitable and constitutional to tax five times the net income actually earned in New York, as in the Gorham case, or income earned wholly in foreign countries where there is no net income in New York, as in the Bass case. Their brief fails to show that the statute effects an approximate separation of state-earned income or that the tax when computed upon income earned without the State is constitutional.

Point II is that the plaintiff fails to show that the formula works inequity against it.

This point is not present in the Bass case, for the income there upon which the tax was measured was wholly foreign.

Point III is that a remedy existed before the Tax Commission.

That effort proved unavailing when tried in the Bass case; so this point is also not in the Bass case.

Point IV is that all the facts must be shown to the assessors.

This was done in the Bass case with the result that the mandatory provisions of the statute were of necessity applied and income earned entirely in foreign countries taxed. The facts of actual sales

within and without the State and actual net profits in and out are rendered immaterial and irrelevant by the statute. Equity does not require the doing of a vain act.

The argument of the appellees (Point I) is predicated upon their construction of the *Underwood* case. In Point II of our main brief (pp. 28-39) many reasons are given in the five subdivisions there why the New York Tax Law is inherently arbitrary. Prominent among these is the fact that, contrary to the Federal method, the State allocates the entire net income of the corporation rather than that arising from business in or partially in the State. Any allocation involves the errors inherent in an approximation; the Federal Government, recognizing this, limits the allocation—the State, on the contrary, magnifies the error by multiplying the allocating percentage by the total net income. Yet it is undisputed that a more correct result is obtained by the Federal method, as is evidenced by the Bass case. The argument of convenience cannot sustain the State method of disregarding reality; for the Federal method is in practice applied to much larger and more complicated business operations. We refer to our Point II as elaborating the many other reasons why this statute is inherently arbitrary.

The appellees' brief rests the argument on the law on the *Underwood* case, treating it as an affirmative and final determination of the constitutionality of taxes upon an apportionment of income to the State by a system of allocation of tangibles within and without the State, and claiming to read in the opinion there an answer to all arguments that the New York law is inherently arbitrary or has produced an unjust result.

In the *Underwood* case, however, the Court expressly reserved the question of the constitutionality of other taxes assessed under the Connecticut statute, saying (254 U. S. 113, 121):

> "We have no occasion to consider whether the rule prescribed, if applied under different conditions, might be obnoxious to the Constitution."

The main challenge of the appellees' is that the Gorham Company has failed to sustain its burden of showing a taxation of income earned extrastate, by not showing the actual income earned in New York.

We repeat that *in the Bass case no such failure of proof is claimed as it is conceded that no net income was earned in New York or, in fact, in the United States. The taxing of income earned without the State is there undisputed.*

But there is no such failure of proof in the Gorham case. We need go no further than the undisputed facts to determine the limits of the net income earned in New York.

It is undisputed that the New York sales were 10½ per cent. of total sales and the entire net income, \$2,089,059.64. 10½ per cent. of this net income is \$219,351.26, and this is the limit of New York net income unless a greater profit were realized on such sales. The uncontroverted proof is, however, that no greater profit was realized on such sales in New York and the entire business was the sale of its own products manufactured in Rhode Island (R., pp. 22-24). Because of these two facts gross sales are in this case a fair guide to net profits.

This figure of net profit from New York sales is about $39,000 more than the figures in our main brief because it disregards the fact that profits from munitions sold wholly outside New York were greater than on silverware. It is this relative rate of profit between these two products that the appellees' brief attempts to controvert. But the result is immaterial. Attributing one-half the profit to manufacture in Rhode Island gives a figure of $110,000 of net profit in New York as against our more exact computation of $90,000. These figures are to be compared with $452,752 of net income actually taxed. In any event, therefore, the result of the appellees' attack upon our proofs is at best but a reduction of the actual tax from a tax upon *five times* the income actually earned in New York to a tax upon *four times* such income.

The statement of facts in our main brief (pp. 12-17) shows the soundness of our calculations, *all based as they were upon the proofs there referred to.* A direct confirmation of the munitions income is found in the affidavit of John S. Holbrook, vice-president (Exhibit 25, pp. 119-122).

II.

Some assertions in the Gorham brief require comment:

Much confusion of the facts is to be found in the appellees' brief at page 26. It is stated that "plaintiff really made no selling efforts at all in the State of Rhode Island where the goods were

manufactured." The record, however, shows that munitions (58 per cent. of total sales) were all made and sold in Rhode Island and that 89½ per cent. of all sales were outside the State of New York (Statement of Facts, Appellant's Brief, p. 15). The reference to inactive stocks in New York (Appellees' Brief, pp. 26, 27) implies, as it is worded, that all such stocks were inactive. This was not so as appears from the record, pages 24, 29, 30.

Again, the appelees' brief (p. 27) states that the general practice was to fill an order from New York stock and have the balance shipped from Providence. This was not the general practice as New York sales were only 10½ per cent. of total sales, and the goods shipped from Providence on prior orders from New York were only $382,221.62 out of nearly $12,000,000 total sales (Appellant's Brief, p. 15).

The appellees' brief (p. 37) asserts that the objection that property outside the State was taxed was not presented until after the decision of the *Alpha* and *Underwood* cases. Again (at p. 8), it is stated that the amendment to the bill *nuno pro tunc* was for the purpose of presenting this objection. These statements are erroneous as the original bill of complaint alleged such objection and the amended complaint elaborates it. The amendment to the complaint by stipulation was "with the same force and effect as if originally included therein," so this discussion is academic (R., pp. 21-22).

III.

Cases cited in the appellees' brief, Point IV, relating to the presentation of facts to the assessors *for the valuation of the entire capital stock of a corporation,* do not relate to the constitutional question here involved. If complaint were made as to the value of any of the assets found by the Commission for the purpose of the allocation, such facts should, of course, be presented to the Commission. Here, however, the operation of the statute is a matter of arithmetic not involving any judicial process, the result of such computation being in effect to tax property without the State. The percentage of the selected assets within the State to those everywhere is computed and that percentage applied to the net income returned to the United States Treasury Department (Sec. 214). Thus no facts concerning where such income is actually earned have any relation to the calculation made by the Commission (see Appellant's Main Brief, Point IV, pp. 41-48). As we have there shown, the decision in the *Alpha* case is binding as to the construction of the statute on this point (see Our Main Brief, pp. 46, 47).

In *Commonwealth* v. *P. Lorillard Co.,* 105 S. E. 683, Virginia Supreme Court of Appeals, January 20, 1921, the reasoning of the opinion is in point. Burks, J., says at page 685:

> "The plaintiff in error is a foreign corporation doing business in Virginia, and a number of other states, and also in foreign countries. It pays a license tax here for doing business in this state, and also a prop-

erty tax on its property located in this state. It has its principal office in the State of New Jersey, where it was incorporated, and derives its income from business done in all the states of the Union and in foreign countries. It would seem plain that the State of Virginia cannot impose an income tax on income derived from business done outside of the state, and this was practically conceded on the argument; but counsel for the state seem to think that the difficulty can be avoided, and the statute be upheld, by allowing the administrative officers to adopt their own methods of ascertaining what amount of income was derived from business done in Virginia, and extending the tax thereon at the rate fixed by the statute. This would be legislation and not administration. Administrative officers have no such power."

See also:

Meyer, Auditor of Oklahoma, v. *Wells Fargo & Co.*, 223 U. S. 298, 302.
Davis v. *Wallace*, 257 U. S. 478, 485.

THE BASS CASE.

IV.

The brief in the Bass case for the defendant-in-error deals with a conceded lack of any net income whatever in the State and a consequent apportionment of net income earned wholly in foreign countries. It seeks to escape the consequences of such a resort to a foreign measure for a State tax, in effect taxing income without the State, by reasoning that there were some taxable assets in the State

and a tax could have been imposed thereon. Therefore, in the absence of such a lawful tax, the tax imposed by the statute may be taken as a substitute. Point VI of our main brief (pp. 49-54) answers these contentions.

None of the cases cited support such conclusion.

In *Shaffer* v. *Carter*, 252 U. S. 37, cited by defendant-in-error, Mr. Justice Pitney says, at page 52:

> "And we deem it clear, upon principle as well as authority, that just as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents *from their property or business within the state, or their occupations carried on therein;* enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders." (Italics ours.)

This is far short of saying that net income of a foreign corporation which does *not* accrue to it from its property or business within the State or its occupation carried on therein can be constitutionally taxed. Yet that is what has been done in the cases at bar.

In *United States Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321, also cited, it was held that a State in levying a general income tax upon the gains and profits of a *domestic* corporation may include in the computation the net income derived from transactions in interstate commerce, without contravening the commerce clause of the Federal Con-

stitution, where there is no discrimination against interstate commerce either in the admeasurement of the tax or in the means adopted for enforcing it. No question of due process was involved.

That case does not reach the cases at bar, where a substantial part of the net income of a foreign corporation, produced largely from interstate or foreign commerce, *earned and received outside the State,* is taxed by the State of New York.

Maxwell v. *Bugbee,* 250 U. S. 525, is a case of inheritance taxes and manifestly to be distinguished from taxation of foreign corporations.

Other cases holding that excise taxes based in one form or another on capital stock were valid must be read in the light of *International Paper Co.* v. *Mass.,* 246 U. S. 135, and other recent cases cited in Point I of appellant's brief, where excise taxes based upon the entire capital stock of a foreign corporation were held invalid (see also other cases distinguished in our said Point VI).

V.

The brief in the Bass case for the defendant-in-error, Point II, attempts to show that the corporation had over $500,000 of assets in New York and that a direct tax thereon would probably equal the tax assessed. This is speculative for the statute expressly exempts the personal property from such tax and that fact is no justification for re-establishing such a tax in a particular case by judicial construction.

But no such assets existed at any time in New York. The sales of Bass ale were about $240,000

for the year and the monthly average of bills and accounts receivable therefrom was $20,449.29, showing approximately a monthly turnover. The monthly average of tangible personalty was $23,668.33, but this was with minor exceptions Bass ale which was sold each month resulting in the bills and accounts receivable of about the same monthly average. So at no time was there any substantially greater personal property on hand than the monthly averages. The figure of personal property fixed in this brief at twelve times its monthly average thus has no foundation in fact. It is flatly contradicted by the testimony (R., p. 34) stating that the company had tangible personal property in the City of New York of between $23,000 and $24,000, including furniture and fixtures and bills and accounts receivable of about $20,450.

Furthermore, the tangible personal property and the bills and accounts receivable cannot be added together to show assets because the personal property is replaced on its sale by bills and accounts receivable therefor, so both assets cannot exist at the same time.

The true value of the assets thus at any tax date for the taxation of personal property would be little more than the monthly average or less than one-tenth of that asserted in the brief for the defendant-in-error. The whole argument of a reasonable tax on personal property, therefore, fails, even were any such speculation permissible.

VI.

The defendant-in-error claims in Point III of its brief, that the plaintiff-in-error had not raised the point that the tax was illegal in that the allocation excluded stocks owned above 10 per cent of its tangibles. The unconstitutionality and illegality of the tax was fully raised in protests made before the Tax Commission prior to the *Alpha* decision (Exhibit D, R., p. 17; Exhibit F, R., pp. 18, 19; Exhibit G, R., p. 19; Exhibit I, R., pp. 20, 21). These protests, having broadly covered all grounds, surely raise questions of partial illegality.

This claim made by the defendant-in-error is no answer in the face of the declaration of the unconstitutionality of the law in this respect by the Court of Appeals of New York (see Plaintiff-in-Error's Main Brief, Point V, pp. 48, 49).

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1923.

No. [redacted] 10

BASS, RATCLIFF & GRETTON, LIMITED,
Plaintiff in Error.

against

STATE TAX COMMISSION,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

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BATAVIA TIMES, LAW PRINTERS,
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POINTS OF ARGUMENT.

LIST OF CASES.

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 24.

BASS, RATCLIFF & GRETTON, LIMITED,
Plaintiff in Error,
against
STATE TAX COMMISSION,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

The plaintiff in this case, represented by the same attorneys as appear in No. 14 on the present calendar, *Gorham Manufacturing Company v. State Tax Commission,* has followed the procedure by certiorari through the courts of New York State rather than the Federal equity suit chosen in the Gorham case. The tax is the same kind of a tax as involved in the Gorham suit, namely, the annual franchise tax on business corporations computed on a proportion of entire net income, the company doing business both within and without the State of New York.

Very much the same objections are raised against the tax as in the Gorham case, the more important being that the statute taxes property beyond the jurisdiction of the State government.

The plaintiff's business was the sale of Bass ale. It was organized under the Laws of Great Britain and had a certificate to do business in New York State, and actually did business in New York during the tax year reviewed here, November 1, 1918 to November 1, 1919. Its claim was, that as it reported to the United States Treasury Department no net income earned in the United States for its fiscal year June 30, 1917 to June 30, 1918, it need not pay a tax to New York for the privilege of doing business here, because it says our tax is computed on the net income returned to the United States, and there was no such income reported.

Plaintiff argued in the state courts (1) that the New York statute did not intend to lay a tax where the net income of a corporation, looking only to its profitable operations, all arises from business conducted in a foreign country, and (2) that if it did, the statute is unconstitutional.

The state courts have settled that the "entire net income" of a corporation under our statute, a part of which is set off by formula to New York, does comprehend all the net income of a corporation regardless of where it is received, in the United States, or elsewhere. Indeed, the statute itself provides:

> **"Any corporation not organized under the laws of any state within the United States shall state the facts in relation to its entire net income as though organized under the laws of this State." (Sec. 211).**

There remains for the plaintiff in this court the same argument as in the Gorham case that the New York formula which apportions the total net income of a corporation, wherever received, on the basis of segregated assets, affects the taxation of the relator's property outside the State of New York.

Exhibit C (page 14, Record) shows the relator's "entire net income" wherever earned for the fiscal year ending June 30, 1918, was $2,185,-600 (fol. 28) and that during that year it had average monthly sales in New York State of $20,-449.29, representing total sales in New York for the year of about $240,000 (fols. 30, 61). These were sales of Bass ale, the average monthly value of such stock of ales being $23,668.33 (fol. 60). The business, of course, due to oncoming prohibition was small compared to previous business, but the franchise was exercised in that year, and sales were made after the first of November, 1918 (fol. 62). Between June 30, 1918 and some date following the first of November, 1918 it disposed of over $284,000 of ales left in New York City (fols. 46, 59, 60). So the franchise was also exercised for the tax year here under review, November 1, 1918, to November 1, 1919. Bear in mind

that the tax under Article 9-A is paid in advance but based on the previous fiscal year's business (Sec. 209, Tax Law).

The relator's argument amounts to this, that admitting it sold goods here in the base year and in the tax year, simply because the transactions in the United States did not show a profit, the State cannot as much as *measure* the *franchise* tax by formally allocating for the purposes of the tax a portion of the corporation's income to New York upon the basis of capital employed here and business done here.

The Appellate Division and the Court of Appeals (with an opinion) affirmed the tax as assessed by the Tax Commission (fols. 66, 75, 81; 198 A. D. 963; 232 N. Y. 42).

The formula for the franchise tax is as follows:

> Sec. 214. *Computation of tax.* If the entire business of the corporation be transacted within the state, the tax imposed by this article shall be based upon the entire net income of such corporation for such fiscal or calendar year as defined in section two hundred and eight of this chapter subject, however, to any correction thereof for fraud, evasion or error, as ascertained by the state tax commission. If the entire business of such corporation be not transacted within the state, the tax imposed by this article shall be based upon a proportion of such entire net income, to be determined in accordance with the following rules: The proportion of the entire

net income of the corporation upon which the tax under this article shall be based, shall be such portion of the entire net income as the aggregate of

1. The average monthly value of the real property and tangible personal property within the state.

2. The average monthly value of bills and accounts receivable for (a) personal property sold by the corporation from merchandise manufactured by it within the state; (b) personal property sold by the corporation from merchandise owned by it and located within the state at the time of the acceptance of the order, but not manufactured by it within this state; and (c) services performed within this state, excluding bills and accounts receivable arising from sales made from a stock of merchandise or other property located at a place of business maintained by the reporting corporation without this state.

3. The proportion of the average value of the stocks of other corporations owned by the corporation, allocated to the state as provided by this section, but not exceeding ten per centum of the real and tangible personal property segregated to this state under this article, bears to the aggregate of

4. The average monthly value of all the real property and personal property of the corporation, wherever located.

5. The average total value of bills and accounts receivable for (a) personal property sold by the corporation from merchandise manufactured by it within and without this state; (b) personal property sold by the corporation from merchandise owned by it at the time of acceptance of the order but not manufactured by it; and (c) services performed both within and without this state, based on orders received at offices maintained by the

corporation, excluding bills and accounts receivable on orders filled from a stock of merchandise or other property maintained by the corporation.

6. The average total value of stocks of other corporations owned by the corporation, but not exceeding ten per centum of the aggregate real and tangible personal property set up in this report.

Real property and tangible personal property shall be taken at its actual value where located. The value of share stock of another corporation owned by a corporation liable hereunder shall for purposes of allocation of assets be apportioned in and out of the state in accordance with the value of the physical property in and out of the state representing such share stock."

What is the base of this tax?

The law provides (1) that you shall first determine the entire net income;

(2) that you shall segregate certain assets to New York State and find what per cent of the whole segregated assets is located in New York State;

(3) that you shall take such a per cent of the entire net income as the assets segregated to New York bear to the entire segregated assets. The result of this procedure is the base of the tax to which to apply the rate provided by law.

Neither the property alone nor the net income alone constitutes the base.

The tax, both in law and in fact, is neither a tax upon income nor upon property.

$$\frac{\text{Assets segregated to N. Y.}}{\text{Total assets}} \times \text{Entire Net Income} = \text{Base of Tax}$$

The base is a combination of capital investment (real and tangible personal property and bills and accounts receivable), sales (bills and accounts receivable and average monthly values of tangible personal property), investment of surplus (stocks) and income.

Plaintiff says that it is obvious that a state which uses net income as one of the factors of the tax base is taxing property beyond its borders and jurisdiction, when no net income is produced on the transactions within the State. We answer, that whether a state statute as a legal proposition taxes *property outside* does not depend upon the fact that there is or is not net income from business in the State, that is to say, the proposition is not settled by observing that no net income arises here and concluding immediately that no *franchise* tax can be assessed here. Net income along with the other factors (capital invested and business done) constitute the measure of the *franchise* tax selected for convenience only. "The selected

measure may appear to be simply a matter of convenience in computation and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority" (*Kansas City Railway v. Kansas* 240 U. S. 227 233). It all goes back to the operation of the formula, whether the formula produces a tax which is inequitably enhanced by consideration of property beyond state jurisdiction. Mere collection of the net income abroad is not the answer.

POINT I.

THE STATE IS TAXING A PRIVILEGE TO CARRY ON A BUSINESS WITHIN ITS BORDERS. IT IS NOT A TAX ON INCOME, BUT TOTAL NET INCOME OF THE CORPORATION IS APPORTIONED UPON THE BASIS OF CAPITAL INVESTED HERE AND BUSINESS CARRIED ON HERE, AND SUCH APPORTIONED NET INCOME IS USED AS A MEASURE OF THE VALUE OF THE FRANCHISE.

A very distinguishing feature between an income tax and our franchise tax under Article 9-A is that an income tax is laid directly upon income and is levied for the year in which the income is received (See State Tax on Personal Incomes, Sections 350, 351, 351-a, 376; and Federal Income Taxes). The state franchise tax on corporations is for the privilege of conducting business within

the State for the coming year valued on business done the year previous.

Article 9-A is a substitute for the old franchise tax under Section 182 of the Tax Law which was based upon dividends declared and capital stock valuations. Article 9-A is honestly called by its title "Franchise Tax on Manufacturing and Mercantile Corporations", and is laid upon a domestic corporation, "for the privilege of exercising its franchise in this state in a corporate or organized capacity," and is imposed upon foreign corporations "for the privilege of doing business in this state" (Sec. 209). The title to Section 209 proclaims the tax to be a franchise tax based on income: "Sec. 209. Franchise Tax on Corporations *based* on Net Income."

In *People ex rel. Barcalo Manufacturing Co. v. Knapp*, 187 A. D. 89, 93, 227 N. Y. 64, and in this cause now upon argument here (*People ex rel. Bass, Ratcliff & Gretton, Limited v. State Tax Commission*, 232 N .Y. 42, 46; Record, fol. 42) the state courts have held, and this court has also held (*Peo. of State v. Jersawit as trustee of Ajax Dress Co.*, decided Jan . 7/24), that the tax in its true nature is a tax for the privilege of carrying on business. Such a tax can be measured in any fashion the State desires (*Home Insurance Co. v. New York*, 134 U. S. 594; *Kansas City Railway v. Kansas*, 240 U. S. 227, 232; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 163, 165; *Cadwalader v. Leder-*

er, 273 Fed. 879, 880) but the plan of course must stand the test of constitutionality with regard to the result it works.

Even assuming the tax were an income tax upon corporations, if the method of taking part of entire net income produces no heavier burden than a tax upon the conduct of the business in New York measured in another way, then the statute, this court has told us, is a fair and equitable one (*Shaffer v. Carter*, 252 U. S. 37, 55; *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113):

> "The practical burden of a tax imposed upon the net income derived by a non-resident from a business carried on within the state certainly is no greater than that of a tax upon the conduct of the business, and this the state has the lawful power to impose, as we have seen." (*Shaffer v. Carter*, 252 U. S. 37, 55.)

New York is endeavoring to arrive at the value of the local business privilege. The State has lawful power to tax the business or the privilege of conducting it.

Under the New York statute all of relator's real and tangible personal property in foreign countries, its bills and accounts receivable and corporate stocks owned in foreign countries have been assigned outside the State and operate to lessen the New York tax, and while it seems startling to the relator that property across the seas is

brought into consideration, the proposition is no different than the bringing in within the formula of property in Pennsylvania, Illinois or elsewhere outside the State of New York (*Underwood Typewriter Co. v. Chamberlain,* 254 U. S. 113; *U. S. Glue Co. v. Town of Oak Creek,* 247 U. S. 321; *Gorham Manufacutring Co v. Tax Commission,* 274 Fed. 975).

The relator does not attempt to show that the tax works injuriously against it upon facts with relation to its entire business and property. It relies abstractly in its attack upon the fact that property *in foreign countries* enters the computation.

We are taxing business or more accurately a privilege to conduct business, and the statute operates both in its plan and in its enforcement against the corporation's property in this state used in that business. Relator had personal property in New York (capital invested) represented by its stock of ales of the average monthly value of $23,668.33 and had sales here (bills and accounts receivable) of the average monthly value of $20,-449.29 (fols. 61, 62). This business was beyond all doubt taxable by New York. The New York statute compares the capital invested in New York and the business activity here with the whole investment and business of the corporation. The fact that the resulting percentage is applied to net income does not change the basic nature of the

inquiry and the measure, *i. e.*, what part of entire business is conducted in New York.

The business in New York was done on thirty days credit (fol. 60) and the receipts from that business were sent to London. The receipts went into gross earnings of the corporation from which after the deduction of expenses net income was derived. Surely the receipt from sales in New York went into the gross earnings of the corporation and helped produce net income.

Business here and abroad was conducted as one unit, the ale was made there and sold here, and the result of the formula for the year in question is but to "throw the burden of the tax upon the going concern as a whole and not on the local branch" as Judge Pound said in the opinion of the Court of Appeals (fol. 77). It was all one business conducted along the same lines everywhere, the manufacture in England and the sale in England, New York and other places of the same manufactured product. (*Wallace v. Hines*, 253 U. S. 66).

In *Postal Telegraph-Cable Co. v. Fremont*, 225 U. S. 124, 127, a license tax imposed by a city on a telegraph company doing both a local and an interstate business, was perforce met by receipts from interstate commerce because the revenue derived from the local business as a whole was in-

sufficient to pay the tax. The tax was nevertheless sustained. "The simple assertion of a loss" does not characterize the tax as an attempt to reach property outside the State.

The Corporation is not compelled to do a local business in New York, and if the tax must be met by receipts from business elsewhere, the local business being unprofitable, it may discontinue its local business (*Pullman Co. v. Adams,* 189 U. S. 420; *Williams v. Talladega,* 226 U. S. 404, 416, 417; *Postal Telegraph-Cable Co. v. Richmond,* 249 U. S. 252, 258).

In conclusion of all discussion, the same judicial inquiry presents itself as in the *Gorham case,* "Does the statute fall within that class where there has been an *exercise in good faith* of the legitimate taxing power?" "We are to look for a practical rather than a logical or philosophical distinction" (*United States Express Co. v. Minnesota,* 223 U. S. 335, 345, 348).

This is a privilege tax (not a property tax) which undoubtedly the State may impose, and appellant's argument seems an effort "to distort the statute from its purpose to tax the privilege, which the statute has created into a property tax, and is unwarranted by any purpose or effect of the enactment" (*Maxwell v. Bugbee,* 250 U. S. 525, 539; *Kansas City R. R. Co. v. Kansas,* 240 U. S. 227, 232).

POINT II.

THE TAX IS A SUBSTITUTE FOR A PERSONAL PROPERTY TAX, AND THE BURDEN IS NO GREATER THAN SUCH A TAX WOULD PRODUCE.

Relator had in New York City during the period Bass ales of the average monthly value of $23,668.33 and bills and accounts receivable (also personal property, Sec. 2, Paragraph 8 of the Tax Law) of the average monthly value of $20,449.29. The average monthly value of the ales was arrived at by dividing the inventory value of ales as of June 30, 1918 when they had on hand at least $282,000 worth of ales (fols. 59, 60, 61). For purposes of personal property taxation therefore they had tangible personal property continuously in New York City of that value, plus the value of the bills and accounts receivable which if the average value was arrived at in the same manner would at any time total over $245,000. On this half million dollars of property it paid no local personal property taxes (fols. 61, 62) because of the exemption contained in Section 219-j of Article 9-A as follows:

> "After this article takes effect, corporations taxable thereunder shall not be assessed on any personal property or capital stock."

At any prevailing rate the tax on this personal property would produce a figure in excess of

$826.14, the tax here assessed upon the franchise under Article 9-A.

POINT III.

THE PLAINTIFF IS NOT IN POSITION TO CLAIM UNCONSTITUTIONALITY BECAUSE OF THE LIMITATION OF ITS STOCKHOLDERS IN OTHER CORPORATIONS TO 10% OF ITS REAL AND TANGIBLE PERSONAL PROPERTY. IT MADE NO SUCH CLAIM BEFORE THE STATE TAX COMMISSION.

In *Alpha Portland Cement Co. v. State Tax Commission,* 230 N. Y. 48, the Court of Appeals, long after this proceeding was instituted, determined that stock holdings should be allowed their full value representation in the assets, which the *early* statute limited to 10%. Plaintiff did not point out to the Tax Commission this phase of unconstitutionality, nor rely upon it. Such objections must be presented clearly and specifically to the assessing officers as argued in Point IV of our brief in *Gorham Manufacturing Co. v. State Tax Commission,* No. 14, October Term 1923.

It cannot be gainsaid that the Court of Appeals declared unconstitutional the limitation of stock to ten per cent of the property of the corporation taxed. That was the determination of a Federal question, which this court may scrutinize as well, and if the court arrives at the question, it may

briefly be stated in support of the limitation, which the legislature afterwards removed, that its purpose was to exclude capital not used in the *ordinary* business of a corporation, as has been the policy of this state for many years (*People ex rel. Southern Cotton Oil Co. v. Wemple,* 131 N. Y. 64, 68; *People ex rel. Seth Thomas Clock Co. v. Wemple,* 133 N. Y. 323, 329; *People ex rel. Singer Manufacturing Co. v. Wemple,* 150 N. Y. 46, 49, 50).

The monies of a manufacturing or mercantile company invested in stocks of other companies are not working capital but surplus or reserve funds, and generally speaking a reserve fund equal to 10 per cent of the aggregate plant and real property values has been deemed by experience a sufficient safety limit for ordinary business purposes. Therefore our statute allowed only so much of a company's stock investment as would represent 10 per cent of its real and tangible personal property, and enforced the rule against both foreign and domestic corporations regardless of whether the physical property represented by the stock is located in New York State or in other states. This was not discrimination, and was not a scheme by which New York State attempted to tax property located outside its boundaries.

The determination of the New York courts should be affirmed.

Respectfully submitted,

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